

Daniel C. Snyder (OSB# 105127), *pro hac vice* pending
Law Offices of Charles M. Tebbutt, P.C.
941 Lawrence St.
Eugene, OR 97401
(541) 344-3505
dan@tebbuttlaw.com

Timothy Bechtold
Bechtold Law Firm, PLLC
PO Box 7051
Missoula, MT 59807
(406) 721-1435
tim@bechtoldlaw.net

Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION**

BUFFALO FIELD CAMPAIGN,

Plaintiff,

vs.

**UNITED STATES DEPARTMENT OF
THE INTERIOR, NATIONAL PARK
SERVICE,**

Defendant.

Case No. _____

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Freedom of Information Act

Plaintiff, Buffalo Field Campaign (“BFC” or “Plaintiff”), alleges as follows:

INTRODUCTION

1. This action is premised upon, and consequent to, violations of the Freedom of Information Act (“FOIA”), 5 U.S.C. §§ 552 *et. seq.* It challenges the unlawful failure of the Defendant, the United States Department of the Interior, National Park Service (“Defendant,” or “Agency”), to abide by the statutory requirements of the FOIA.

2. Defendant is unlawfully withholding public disclosure of information sought by Plaintiff, information to which Plaintiff is entitled and for which no valid disclosure exemption applies or has been asserted. In particular, Defendant has violated, and remains in violation of, the statutory mandates imposed by FOIA by: (1) failing to provide a final determination resolving Plaintiff’s FOIA Appeal within the time required by law; and (2) unlawfully withholding agency records from BFC and the public to which no valid disclosure exemption applies, including reasonably segregable, non-exempt portions of responsive records, in response to Plaintiff’s FOIA Request.

3. Plaintiff seeks declaratory relief establishing that Defendant has violated the FOIA. Plaintiff also seeks injunctive relief directing Defendant to promptly provide Plaintiff with the requested material. Finally, Plaintiff seeks an Order from the Court directing Defendant to pay Plaintiff’s reasonable attorneys’ fees and

costs incurred in bringing this action.

JURISDICTION, VENUE, AND BASIS FOR RELIEF

4. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because this action arises under the FOIA and the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.*
5. Venue properly vests in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in this District. Plaintiff resides and has its principal place of business in the District of Montana.
6. This case is properly brought in the District of Montana, Missoula Division. BFC's habitat coordinator, Darrell Geist, resides and has his office in Missoula, Montana. Mr. Geist submitted the FOIA Request at the heart of this dispute on behalf of BFC, and will continue to play a major role obtaining, reviewing, and releasing information obtained from responsive records to shed light on ongoing government action. BFC conducts regular business activity in Missoula, and all year-end financial information is processed in Missoula, as reflected on BFC's annual reports to the State.
7. Declaratory relief is appropriate under 28 U.S.C. § 2201.
8. Injunctive relief is appropriate under 28 U.S.C. § 2202 and 5 U.S.C. § 552(a)(4)(B).
9. Attorneys' fees and costs may be awarded by the Court to a substantially

prevailing plaintiff pursuant to 5 U.S.C. § 552(a)(4)(E).

PARTIES

10. Plaintiff Buffalo Field Campaign (“BFC”) is a non-profit public interest organization founded in 1997 to stop the slaughter of Yellowstone’s wild bison, protect the natural habitat of wild free-roaming bison and other native wildlife, and to work with people of all Nations to honor the sacredness of the wild bison. BFC is supported by volunteers and participants around the world who value America’s native wildlife and the ecosystems upon which they depend, and enjoy the natural wonders of our National Parks and Forests. BFC has field offices in West Yellowstone, and Gardiner, Montana, where volunteers congregate and conduct daily field patrols to document government activities directed against wild buffalo. As BFC’s habitat coordinator, Mr. Geist regularly conducts business with and for BFC through his Missoula residence and office.

11. BFC, as an organization and on behalf of its members, is concerned with and actively involved with protecting the last remaining descendants of the native plains bison on this continent, and advocating that such bison be allowed to occupy their original range. BFC actively seeks to document and publicize the plight of the bison, to end their slaughter by government agencies, and to secure long-term protection for viable populations of wild bison and year-round habitat. BFC actively engages the American public to honor cultural heritage by allowing wild

bison to exist as an indigenous wildlife species and fulfill their inherent ecological role within their native range, and serve as the genetic wellspring for future, wild bison populations.

12. Defendant National Park Service is a division of the U.S. Department of the Interior, which itself is an agency of the executive branch of the United States government. The specific custodian of records at issue in this Complaint is the Office of Superintendent, Yellowstone National Park, which is part of the National Park Service.

13. Defendant is an “agency” as defined by 5 U.S.C. § 552(f)(1) and is therefore subject to the provisions of FOIA.

STATEMENT OF OPERATIVE FACTS

14. The FOIA requires U.S. government agencies to promptly make public records available to any person if that person makes a request which (1) reasonably describes the records sought and (2) complies with any applicable agency rules for making such a request. 5 U.S.C. § 552(a)(3)(A).

15. The FOIA requires an agency to issue a final determination on any such information request within twenty business days from the date of its receipt. 5 U.S.C. § 552(a)(6)(A)(i).

16. On June 20, 2018, Mr. Geist, in his capacity as BFC’s habitat coordinator, electronically submitted a FOIA Request (the “FOIA Request”) to Kerrie Evans,

Freedom of Information Act Coordinator for the National Park Service, Yellowstone National Park, Office of the Superintendent. A true and correct copy of the FOIA Request is attached as Attachment 1.

17. The FOIA Request sought disclosure of records concerning Yellowstone National Park's policy "surrounding the size of the bison population or herds in the Yellowstone ecosystem," excluding records previously produced. *Id.*

18. The FOIA Request also sought a fee waiver for all search and duplication fees associated with responding to the Request. *Id.*; *see also* 5 U.S.C. § 552(a)(4)(E)(iii). That fee waiver was ultimately granted by the Agency and is not in dispute in this Complaint.

19. On July 18, 2018, Kerrie Evans, the Yellowstone National Park FOIA Coordinator, provided a "notice of delay" in response to the FOIA Request. In that notice, Ms. Evans indicated that the FOIA Request had been accepted by the Agency and assigned control number NPS-2018-00887. The response further stated that "As yet, we have been unable to make a determination on your request."

20. On July 18, 2018, Kerrie Evans also provided a "partial response" to BFC's FOIA Request. In that partial response, Ms. Evans stated that the Agency has "been unable to make a determination on the remaining documents responsive to your request." Some records responsive to the Request were produced at that time.

21. On August 15, 2018, Mr. Geist wrote Ms. Evans to determine whether the

Agency would be releasing any further records responsive to the FOIA Request.

On August 16, 2018, Ms. Evans responded by indicating a final determination would be forthcoming in the near future.

22. On August 22, 2018, the Agency provided BFC with its “final response” to the FOIA Request. *See* Attachment 2. In that final response, the Agency provided, *inter alia*, 17 records responsive to the Request, totaling 149 pages, but redacted portions of the records due to the Agency’s application of Exemption b(5), 5 U.S.C. § 552(b)(5). These records are the subject of this Complaint.

23. On October 22, 2018, BFC timely appealed the Agency’s final determination to the Department of the Interior FOIA Appeals Office. *See* Attachment 3.

24. In its appeal, BFC sought review of the Agency’s redaction of specific records in response to the Request. In particular, BFC challenged that Exemption 5 could be properly applied to the responsive records because:

- a. The records are neither predecisional nor deliberative, but rather reflect the messaging the Agency used to explain decisions it already made pursuant to its Congressionally delegated duties;
- b. The records contained factual material that should be reasonably segregated from exempt portions of the records, especially with regards to the fully withheld Environmental Assessment on

Conservation and Management of Yellowstone Bison;

- c. In two instances, a withheld record appears to be drafts of a scientific article for the scientific journal *Policy Sciences*; and
- d. Another record withheld as deliberative was sent from a “trusted colleague inside the BLM” to Dan Wenk, then Superintendent of Yellowstone National Park.

25. In this Complaint, BFC challenges all withholdings made by the Agency concerning its FOIA Request as they pertain to Exemption 5 only.

26. BFC did not receive a response to its FOIA Appeal within the timeframe allowed by law, and has therefore constructively exhausted its administrative remedies.

27. In February, 2019, months after BFC filed its appeal, counsel for the Plaintiff contacted Charis Wilson, the Agency’s FOIA Officer. Counsel requested that Ms. Wilson determine whether the FOIA Appeal had been received and, if so, when a response would be forthcoming.

28. On March 4, 2019, counsel for the Plaintiff contacted Ms. Wilson by e-mail, asking for a status update on the appeal. Ms. Wilson responded that same day, indicating that she had reached out to the Agency’s FOIA appeal office and had not yet received a response.

29. Counsel for Plaintiff contacted Ms. Wilson again on March 14, 2019. Ms.

Wilson again responded that she had not “heard anything back” from the Agency’s FOIA appeal office.

30. On March 18, Ms. Wilson wrote to Plaintiff’s counsel indicating that the Department of the Interior’s Appeal Office received BFC’s appeal on October 22, 2018, and that it was assigned tracking number 2019-007. Ms. Wilson wrote:

“They have routed the appeal to us and notified us that they want to provide them with copies of the records that are the subject of the appeal by March 26.”

31. Having received no determination on its appeal, on May 30, 2019, counsel for BFC again wrote to Ms. Wilson. Counsel stated that “I am following up on this one last time before we head off to court. We haven't heard anything from the DOI appeals office since your March 18, 2019 e-mail below. Calls and e-mails have again gone unanswered. Can you please check back with the DOI FOIA appeals office for me to obtain the status of this appeal?”

32. On June 3, 2019, Ms. Wilson responded to Plaintiff’s counsel’s e-mail. She stated: “The last I heard from the appeals office they planned to issue a response ‘soon’. I contacted them last week after receiving your email and have not yet heard back from them.”

33. As of the date of this Complaint, BFC has not received any response to its FOIA Appeal, nor has it received any revised record production from Defendant.

34. To date, no further correspondences or communication have been received

by BFC from the Agency concerning BFC's FOIA Request.

35. To date, no "determination" has been provided to BFC concerning its FOIA Appeal, as that term is used in 5 U.S.C. § 552(a)(6)(A)(ii).

36. BFC has constructively exhausted all administrative remedies required by FOIA. 5 U.S.C. § 552(a)(6)(A), (a)(6)(C).

37. BFC has been required to expend costs and to obtain the services of a law firm, consisting of attorneys and legal assistants, to prosecute this action.

CAUSES OF ACTION

COUNT I

VIOLATION OF THE FREEDOM OF INFORMATION ACT: APPEAL DETERMINATION DEADLINE VIOLATION

38. The allegations made in all preceding paragraphs are realleged and incorporated by reference.

39. BFC has a statutory right to have Defendant process its FOIA requests in a manner which complies with the FOIA. Plaintiff's rights in this regard are violated by Defendant's unlawful delay in informing BFC of its final determination as to the FOIA Appeal beyond the twenty-day statutory deadline. 5 U.S.C. § 552(a)(6)(A)(ii).

40. To date, BFC has not received any communication from Defendant about whether the Agency will respond to its FOIA Appeal, its reasons for making that decision, and any right of BFC to seek judicial review.

41. Based on the nature of Plaintiff's organizational activities, Plaintiff will continue to employ FOIA's provisions in information requests to Defendant in the foreseeable future. These activities will be adversely affected if Defendant is allowed to continue violating FOIA's response deadlines.

42. Unless enjoined and made subject to a declaration of Plaintiff's legal rights by this Court, Defendant will continue to violate the rights of Plaintiff to receive public records under the FOIA.

43. Defendant's failure to make a determination on BFC's FOIA Appeal within the statutory timeframe has prejudiced Plaintiff's ability to timely obtain public records.

COUNT II

VIOLATION OF THE FREEDOM OF INFORMATION ACT: UNLAWFUL WITHHOLDING OF NON-EXEMPT PUBLIC RECORDS

44. The allegations made in all preceding paragraphs are realleged and incorporated by reference herein.

45. BFC has a statutory right to have Defendant process BFC's FOIA requests in a manner which complies with FOIA. BFC's rights in this regard are violated by Defendant's failure to promptly provide public, non-exempt records to BFC in response to the FOIA Request. 5 U.S.C. § 552(a)(3).

46. Defendant is unlawfully withholding public disclosure of information sought by BFC, information to which BFC is entitled and for which no valid disclosure

exemption applies, including the “deliberative process” exemption. 5 U.S.C. § 552(b)(5).

47. Defendant is also unlawfully withholding reasonably segregable, non-exempt portions of responsive records, contrary to 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”).

48. Based on the nature of BFC’s organizational activities, it will undoubtedly continue to employ FOIA’s provisions in information requests to Defendant in the foreseeable future.

49. BFC’s organizational activities will be adversely affected if Defendant is allowed to continue violating FOIA’s disclosure mandates.

50. Unless enjoined and made subject to a declaration of BFC’s legal rights by this Court, Defendant will continue to violate the rights of BFC to receive public records under the FOIA.

REQUEST FOR RELIEF

WHEREFORE, BFC requests that this Court:

1. Declare Defendant’s failure to fully disclose the records requested by Plaintiff in the FOIA Request to be unlawful under the FOIA, 5 U.S.C. § 552(a)(3).
2. Order Defendant to promptly provide BFC with the records it has

unlawfully withheld under the “deliberative process” exemption, 5 U.S.C. § 552(b)(5).

3. Declare Defendant’s failure to make a timely final determination on Plaintiff’s FOIA Appeal to be unlawful under the FOIA, 5 U.S.C. §§ 552(a)(6)(A)(i), (ii).

4. Award BFC its reasonable attorneys’ fees and costs pursuant to 5 U.S.C. § 552(a)(4)(E) and 28 U.S.C. § 2412.

5. Grant such other and further relief as the Court may deem just and proper.

Filed this 10th Day of October, 2019.

/s/ Timothy Bechtold

Attorneys for Plaintiff